APPELLANT'S BRIEF

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2014-P-1217

SUFFOLK COUNTY

LYNN KACE, as Administrator of the Estate of Jeffrey Kace,
PLAINTIFF-APPELLEE

V.

IVAN LIANG, M.D.,
DEFENDANT-APPELLANT

ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

BRIEF OF THE DEFENDANT-APPELLANT,
IVAN LIANG, M.D.

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STATEMENT OF THE ISSUES

Whether the Defendant is entitled to a new trial in this medical malpractice action, where:

1. The trial court allowed the Plaintiff to introduce expert opinion testimony on a new theory of liability which had not been disclosed to the Defendant in advance of the expert witness's testimony at time of trial, resulting in unfair surprise and unwarranted prejudice to the Defendant;

2. The Plaintiff's failure to make the required disclosure of the anticipated opinion testimony of her expert witness was unexplained and lacked justification;

3. The trial court permitted Plaintiff's counsel to cross-examine the Defendant by reference to printed website pages which were not authenticated and constituted hearsay not subject to any exception;

4. The trial court unfairly precluded the Defendant from referencing the contents of a medical record that was in evidence during his cross-examination of Plaintiff's expert witness; and,

5. The substantial rights of the Defendant were adversely affected by the trial court's erroneous evidentiary rulings.

STATEMENT OF THE CASE

Charles Kace, Sr. and Lynn Kace, as Administrators of the Estate of Jeffrey Kace, commenced this wrongful death action alleging medical malpractice on October 23, 2008 by filing a Complaint that named Ivan Liang, M.D. as the sole defendant. (Record Appendix, pp. 2, 8-13)(hereafter, "R.A. -") On February 18, 2010 a Suggestion of Death Upon the Record was filed as to Charles Kace, Sr. (R.A. 20) On May 10, 2010 the Plaintiffs moved to amend the Complaint to remove Charles Kace Sr. as a plaintiff, and to reflect that Lynn Kace was the sole plaintiff. (R.A. 5, 22-28) The Defendant did not oppose this Motion, and it was allowed by the trial court (Fahey, J.) on May 13, 2010. (R.A. 22) The operative Compliant alleged, *inter alia*, that Dr. Liang acted negligently in providing medical care and treatment to the Kaces' son, Jeffrey Kace (hereafter, "Mr. Kace"), on or about August 14, 2006, and that the Defendant's

alleged negligence and gross negligence resulted in Mr. Kace's death on August 15, 2006. (R.A. 24-28) In answer, the Defendant denied the Plaintiff's allegations that he acted negligently in treating Mr. Kace, and further denied that any alleged negligence on his part caused Mr. Kace's death. (R.A. 14-18)

On November 15, 2011 the parties filed a joint Pre-Trial Memorandum at a pretrial conference held on that date. (R.A. 4, 6, 29-40) The information contained in the Pre-Trial Memorandum, discussed in detail below, included a disclosure of the identity of the expert witnesses that each party expected to call at time of trial, together with a statement of the facts and opinions to which each witness was expected to testify. (R.A. 31-40)

Trial began on February 25, 2014 before Suffolk Superior Court Justice Elizabeth M. Fahey and a jury. (R.A. 2); Trial Transcript, pp. 1 *et seq.* (hereafter, Tr. -) The Defendant moved for a directed verdict at the close of the Plaintiff's evidence, and renewed that motion at the close of all of the evidence. (R.A. 50-51); Tr. 565) Those motions were denied. (R.A. 52-54; Tr. 565)

On March 3, 2014 the jury returned a verdict in favor of the Plaintiff. (R.A. 52-54) In answer to special questions, the jury found that the Defendant was negligent in his care and treatment of Mr. Kace, and that this negligence was a substantial contributing factor in causing the death of Mr. Kace. (R.A. 52) The jury further found that the Defendant was not grossly negligent in his care and treatment of Mr. Kace. (R.A. 53) The jury awarded damages to the Plaintiff in the amount of Two Million, Nine Hundred and Twenty-five Thousand Dollars ($2,925,000). (R.A. 54) Judgment entered on the jury verdict on March 4, 2014. (R.A. 55)

The Defendant filed a timely Motion for New Trial or, in the Alternative, a Remittitur. (R.A. 56-78) As grounds for this Motion the Defendant argued, *inter alia*, that he was unfairly prejudiced by the trial court's decision to permit the Plaintiff to elicit opinion testimony from her expert witness, Alexander McMeeking, M.D., that had not been disclosed to the Defendant in advance of trial. (R.A. 61) The Defendant also challenged the trial court's decision to permit Plaintiff's counsel to cross-examine the Defendant by referring to the contents of printed

pages from websites that were not in evidence and had not been shown to be reliable authority. (R.A. 61-62) In addition, the Defendant argued that the trial court had unfairly restricted his cross-examination of the Plaintiff's expert witness, Dr. McMeeking, by refusing to permit defense counsel to question Dr. McMeeking about the contents of a medical record that was in evidence and which had been discussed during this witness's direct testimony. (R.A. 59-60) The defendant further contended that the verdict was excessive and against the weight of the evidence. (R.A. 62-63)

The trial court denied the defendant's Motion on April 28, 2014, making the following notation on the Motion: "After hearing and review this motion is denied. Given the SJC's *Lorillard* decision, remittitur is neither required nor appropriate. The motion is denied for the reasons set forth in the [plaintiff's] opposition at pp. 7-11." (R.A. 94)

The Defendant filed a timely notice of appeal from the denial of his Motion for a New Trial and the trial court's evidentiary rulings. (R.A. 95-96) The case was entered in this Court on August 6, 2014.

STATEMENT OF THE FACTS

A. The Medical Care and Treatment at Issue.

At approximately 10:54 a.m. on August 14, 2006, Mr. Kace, an otherwise healthy twenty-three year old with no significant medical history, presented to the Emergency Department at St. Elizabeth's Medical Center with complaints of symptoms that included chest congestion, fever, back pain, malaise, coughing, and chest pain. (Trial Exhibits, pages 8-10)(hereafter, "Ex. -) Dr. Liang took a history from Mr. Kace, who reported having a fever, cough, malaise, and chest pain. Dr. Liang determined the chest pain to be pleuritic in nature, based upon the patient's description of the pain as a tightness and need to cough with deep inspirations. Mr. Kace also reported having a slight sore throat. (Ex. 9) Dr. Liang examined Mr. Kace, and noted the results of his examination in the medical record. Dr. Liang's examination indicated, among other findings, that the patient's heart had a regular rate and rhythm. (Ex. 10) Dr. Liang ordered a chest x-ray, and the results were reported as a normal study, with "clear lungs". (Ex. 10, 13) Mr. Kace was given Tylenol. Dr. Liang

diagnosed Mr. Kace with bronchitis, and discharged him home with prescriptions for Azithromycin and Vicodin, and instructions to return if his symptoms worsened. (Ex. 14, 17)

Mr. Kace was found unresponsive at his home on the following day, and was pronounced dead at 6:52 a.m. on August 15, 2006. (Ex. 27) An autopsy was performed, and the cause of Mr. Kace's death was reported to be cardiac dysrhythmia due to viral myocarditis, viral origin. The contributory cause of death was reported to be bronchitis, viral origin. (Ex. 27; 29)

B. The Plaintiff's Disclosure of the Anticipated Testimony of Her Expert Witness, Alexander McMeeking, M.D. and the Defendant's Corresponding Expert Witness Disclosure.

Plaintiff described the opinion testimony that she intended to elicit from her expert witness, Alexander McMeeking, M.D., a physician practicing in the specialties of Internal Medicine and Infectious Disease, in the Pretrial Memorandum filed with the Court on November 15, 2011. (R.A. 32-35) She did not supplement her disclosure of Dr. McMeeking's anticipated testimony at any time. According to the disclosure in the Pretrial Memorandum, the Plaintiff

expected to call Dr. McMeeking to testify that the accepted standard of care in 2006 "required the average qualified emergency medicine physician" to do the following: "recognize and appreciate that fever, chest pain, malaise, and tachycardia could be signs and symptoms of viral myocarditis"; "order an ECG and cardiac enzyme testing to rule out viral myocarditis"; and, "immediately admit the patient for cardiology and infectious disease consultations and steroid treatments if the diagnosis was considered." (R.A. 34) Dr. McMeeking was further expected to testify that Dr. Liang deviated from the standard of care of the average qualified emergency medicine physician in his treatment of Mr. Kace for three specific reasons, each of which pertained to Dr. McMeeking's delineation of the requirements of the applicable standard of care: "Dr. Liang failed to recognize and appreciate fever, chest pain, malaise, and tachycardia as signs and symptoms of viral myocarditis"; "Dr. Liang failed to order an ECG and cardiac enzyme testing to rule out myocarditis"; and, "Dr. Liang failed to immediately admit the patient for cardiology and infectious disease consultations and steroid treatments if the diagnosis was considered." (R.A. 34)

Dr. Liang identified John Benanti, M.D., a physician who is Board-Certified in Emergency Medicine, as an expert witness expected to testify on his behalf at time of trial. (R.A. 35-37; Tr. 497) As set forth in detail in the Pre-Trial Memorandum, Dr. Benanti was expected to testify that Dr. Liang complied with the standard of care required of him in providing care and treatment to Mr. Kace, and that there was no causal relationship between Dr. Liang's care of Mr. Kace on August 14, 2006 and Mr. Kace's death the following day. (R.A. 37)

The detailed description of Dr. Benanti's opinions included anticipated testimony that specifically and directly rebutted each of Dr. McMeeking's three criticisms of Dr. Liang's care of Mr. Kace. (R.A. 37) That is, Dr. Benanti was expected to testify that "the symptoms with which Mr. Kace presented to the emergency room are very common and that a diagnosis of myocarditis is very rare"; "Mr. Kace did not present with the classic signs or symptoms of fulminant myocarditis"; and "there was nothing in Mr. Kace's presentation that could have possibly suggested the ultimate course that Mr. Kace would take from an illness that would not normally be

part of the medical decision-making process based upon Mr. Kace's history, physical examination and imaging studies." (R.A. 37) In addition, and contrary to Dr. McMeeking's view that Dr. Liang "failed to recognize and appreciate fever, chest pain, malaise, and tachycardia as signs and symptoms of viral myocarditis", it was Dr. Benanti's opinion that Dr. Liang acted appropriately in taking a history from Mr. Kace, examining him, ordering a chest x-ray which was read as normal, diagnosing Mr. Kace with bronchitis, and ordering proper treatment for that condition. (R.A. 37) Furthermore, Dr. Benanti explicitly disputed Dr. McMeeking's opinion that Dr. Liang did not comply with the standard of care by failing to order an ECG and cardiac enzyme testing. According to Dr. Benanti, Mr. Kace's presentation did not require the performance of an EKG or cardiac enzymes. (R.A. 37) Furthermore, Dr. Benanti specifically disagreed with Dr. McMeeking's opinion that the standard of care required that Mr. Kace be admitted to the hospital and that a cardiology consultation or infectious disease consultation was required under the applicable standard of care. (R.A. 37)

C. The Challenged Trial Testimony Of Plaintiff's Expert Witness, Dr. McMeeking, and Plaintiff's Substantial Reliance Upon That Undisclosed Testimony To Support A New Theory of Liability.

On the third day of trial, the Plaintiff called his only expert witness, Dr. McMeeking, a specialist in Internal medicine with a subspecialty in Infectious Disease. (Tr. 198-199) Plaintiff's counsel questioned Dr. McMeeking about the requirements of the standard of care in 2006 applicable to a physician evaluating a patient in an emergency room setting who presented with certain symptoms, including pleuritic chest pain and difficulty breathing. (Tr. 210-211, 226-227) Plaintiff's counsel also elicited opinion testimony from Dr. McMeeking concerning the tests to be ordered where a physician suspected myocarditis, which Dr. McMeeking opined would include an EKG and blood enzyme testing. (Tr. 235-236) Dr. McMeeking testified that, in his opinion, the results of an EKG performed on Mr. Kace would have been abnormal and shown inflammation of the heart. In his opinion, an abnormal EKG result showing inflammation, in combination with Mr. Kace's symptoms, would most likely have led to a diagnosis of myocarditis. (Tr. 235-236) Dr. McMeeking testified that if cardiac enzyme testing had been performed, the

results would have been abnormal and Mr. Kace would have been admitted to the hospital. In addition, Dr. McMeeking opined that if the diagnosis of myocarditis had been made in this case, Mr. Kace would have been admitted to the hospital, and most likely been seen by a cardiologist or infectious disease specialist, and he would have been on a monitor. (Tr. 235-236) According to Dr. McMeeking, Mr. Kace would have survived his illness if he had had an EKG and blood testing, and had been admitted to the hospital. (Tr. 235-238)

Plaintiff's counsel then sought to elicit additional opinion testimony from Dr. McMeeking by asking him to assume that "Dr. Liang spent five minutes or less with Mr. Kace, taking a history and doing a physical exam", and then asking whether the witness had an opinion, "to a reasonable degree of medical certainty, whether that would be an appropriate amount of time to evaluate a patient like Mr. Kace."[1] (Tr. 238) Counsel for the Defendant

[1] The length of the examination was a disputed issue at trial. Dr. Liang testified that he had no memory of treating Mr. Kace, and therefore had no recollection of how much time he spent with him. (Tr. 110) He further testified that he "more likely spent more than five minutes with the patient" (Tr. 114). In

objected to this question, and counsel were heard at sidebar. (Tr. 238-240) As grounds for his objection, defense counsel cited a lack of disclosure. (Tr. 238) When asked by the trial court whether this opinion was in the disclosure, Plaintiff's counsel responded that he did not know if "the timing" or the "amount of time" was included within the disclosure, but contended that to the extent that the disclosure indicated that Dr. McMeeking would testify that Dr. Liang would have ordered testing if he had treated the patient appropriately, the "gist" of this opinion was covered by the disclosure. (Tr. 238-239) Counsel for the Defendant disagreed, stating as follows: "There has been no disclosure of any focus on the plaintiff's expert's theory that there was an inappropriate exam by Dr. Liang by way of his timing." Instead, "the focus has been that because the patient presented with a fever, a cough, tachycardia and chest pain, that Dr. Liang should have ordered an EKG and cardiac enzymes." (Tr. 239) Defendant's counsel emphasized that

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addition, Dr. Liang testified that the medical records were inconsistent as to the timing issue. For example, the radiology report reflected that a chest x-ray was completed at 11:25, yet the discharge instructions indicated that the patient was being discharged at 11:25. (Tr. 161)

"[t]here was no disclosure that Dr. McMeeking was going to testify today, that Dr. Liang's exam was too short or not thorough enough. No disclosure whatsoever on the time." (Tr. 239) Judge Fahey overruled the Defendant's objection. (Tr. 240) Dr. McMeeking proceeded to testify that "it's impossible to do a - a- a competent history and a physical in five minutes. **It would take at least 20 minutes** to get an appropriate history and examination from a patient like Mr. Kace." (Tr. 240)(Emphasis supplied.)

Moreover, although Dr. McMeeking was not asked about the length of time issue on cross-examination, plaintiff's counsel was permitted to revisit and reaffirm this undisclosed opinion testimony on re-direct examination, over the objection of defense counsel. (Tr. 341) In response to additional questioning by Plaintiff's counsel, Dr. McMeeking reiterated his view that "[y]ou can never get an adequate history and physical examination in five minutes", and that it would be "even harder, impossible" to do so with a patient that the physician had not previously met. (Tr. 341) Dr. McMeeking did not rely on any medical literature or studies to support his opinion as to the necessary length of an

emergency department examination by someone with Mr. Kace's symptoms.

The undisclosed opinion testimony as to the Plaintiff's new theory of liability: *i.e.*, that Dr. Liang deviated from the applicable standard of care by failing to spend a specified amount of time with Mr. Kace during the emergency room encounter at issue and that a minimum of twenty minutes was required for an adequate examination, ultimately became a central and fundamental element of the Plaintiff's case. In his closing argument, Plaintiff's counsel, relying on Dr. McMeeking's new opinion, repeatedly cited the length of time that Dr. Liang allegedly spent with Mr. Kace in urging the jury to find that Dr. Liang failed to do his "job" by not spending more time with Mr. Kace and thereby failed to comply with the accepted standard of care (*E.g.*, Tr. 636-639, 644-647) In particular, counsel asserted no less than thirteen (13) separate times that Dr. Liang had spent less than five minutes with Mr. Kace. (Tr. 634, 636, 637-639, 644, 645-647) Plaintiff's counsel also emphasized that Dr. McMeeking had opined that an appropriate history and physical examination takes "twenty minutes at a minimum". (Tr. 638) Furthermore, Plaintiff's counsel appealed to the

jurors to consider their own personal experiences in assessing whether Dr. Liang was negligent, stating: "...everybody has been to an emergency department... I would submit to you, despite what the defense tried to do, every person knows that an emergency room physician spends more than five minutes with you." (Tr. 637), thereby asking the jurors to draw on their personal experience under different circumstances.

Plaintiff's counsel also elicited testimony from Dr. McMeeking about the significance of information contained in Mr. Kace's medical records from Pediatric & Adolescent Medicine, pertaining to treatment for bronchitis in September of 2000 (Tr. 243-244; Ex. 20), and from Ohio University Health Services, pertaining to treatment for bronchitis on October 14 and 16, 2003, and on May 26, 2004. (Tr. 242-243; Ex. 23, 24) Dr. McMeeking testified that the Ohio University Health Services records did not reflect any complaints of chest pain. (Tr. 243) Defendant's counsel sought to question Dr. McMeeking as to whether the Pediatric & Adolescent Medicine records reflected a complaint of chest pain, but was precluded from examining Dr. McMeeking on the contents of this record. (Tr. 325-327)

D. Plaintiff's Counsel's Use of Printed Web Pages During His Cross-Examination of Dr. Liang.

During his examination of Dr. Liang, Plaintiff's counsel sought to question him about the contents of documents that purportedly were printed from the websites maintained by Mayo Clinic and Johns Hopkins University Hospital, and which purported to describe the common symptoms of myocarditis. (Tr. 441-450; Ex. 79-82) On the face of the documents, it is clear that the website information is directed to lay persons. (Ex. 79-82) Dr. Liang testified that he was not sure he had seen these exact websites, and did not know their contents. (Tr. 441-442) Over the objection of Defendant's counsel, Plaintiff's counsel proceeded to read the information aloud, and to question Dr. Liang about the information contained in the pages printed from the websites that were undated. (Tr. 442-450) Defendant's counsel objected to this line of questioning, noting that the website documents were undated. (Tr. 443) Plaintiff's counsel did not offer any explanation as to how this material could be considered authentic, relevant and reliable evidence, but instead contended that the information "[g]oes under standard of care". (Tr. 443) Judge Fahey

overruled the objection. (Tr. 443) In his closing argument, counsel for the Plaintiff claimed that he had brought in "studies" from Johns Hopkins and the Mayo Clinic for the jury's consideration. (Tr. 642)

ARGUMENT

A. Standard of Review

The standard to be applied by this Court in determining whether a new trial is warranted is whether the trial court's decision to allow the challenged testimony and evidence constituted an abuse of discretion resulting in prejudicial error. Resendes v. Boston Edison Co., 38 Mass. App. Ct. 344, 350 (1995). Where a plaintiff presents multiple theories of liability to a jury, a new trial is required if (a) any one of those theories lacks sufficient evidentiary support or is legally defective; and, (b) it cannot be determined whether the jury found for the plaintiff on a defective theory. *See, e.g.,* Pelletier v. Town of Somerset, 458 Mass. 504, 521-422 (2010)(new trial required where jury heard significant amount of incompetent evidence); Slate v. Bethlehem Steel Corp., 400 Mass. 378, 384 (1987)(new trial necessary where the court "cannot ascertain on which theory the jury relied").

See also Middlesex Supply, Inc. v. Martin & Sons, 354 Mass. 373, 375 (1968)("Since this incompetent evidence may have influenced the jury, there must be a new trial.")

B. The Trial Court's Decision to Allow the Plaintiff to Introduce Expert Opinion Testimony On A New and Undisclosed Theory of Liability Constituted An Abuse of Discretion and Resulted In Unfair Surprise and Unwarranted Prejudice to the Defendant, Requiring a New Trial.

Rule 26(e)(1)(B) of the Massachusetts Rules of Civil Procedure requires a party "to make timely supplementation of discovery responses so as to report any changes in the substance of expected expert testimony." Hammell v. Shooshanian Eng. Assoc., 73 Mass. App. Ct. 634, 637 n. 3. Under Massachusetts law, "trial judges have 'extensive discretion' with respect to the admission of expert testimony", and an appellate court reviewing the exercise of that discretion does so with 'great deference'." Beaupre v. Cliff Smith & Assocs., 50 Mass. App. Ct. 480, 485 (2000). Under the circumstances of this case, the trial judge's decision to allow the Plaintiff to elicit undisclosed opinion testimony from Dr. McMeeking requires a reversal of the judgment and grant of a new trial because admission of the

challenged testimony constituted an abuse of discretion, and resulted in unfair surprise and prejudice. *Cf.* Fourth Street Pub, Inc. v. National Union Fire Ins. Co., 28 Mass. App. Ct. 157, 162-163 (1989)(trial court abused its discretion in excluding proposed expert testimony; new trial was warranted because substantial rights of a party were adversely affected).

As noted by the First Circuit Court of Appeals in discussing the purpose of the disclosure requirements of Fed. R .Civ. P. 26, this requirement "increases the quality and fairness of the trial by 'narrowing [the] issues and eliminat[ing] surprise.'" Licciardi v. TIG Ins. Group, 140 F.3d 357, 363 (1998), quoting Johnson v. H.K. Webster, Inc., 775 F.2d 1, 7 (1st Cir. 1985). *See also* Charles A. Wright & Richard L. Marcus, *Federal Practice and Procedure* § 2049.1 (2d ed. 1994) ("[Rule 26] makes a special point of the importance of full disclosure and supplementation with regard to expert testimony, a traditionally troublesome area concerning last-minute changes.") Moreover, "part of the purpose of the disclosure and supplementation requirements in Rule 26 is to alleviate 'the heavy burden placed on a cross-examiner

confronted by an opponent's expert whose testimony had just been revealed for the first time in open court'". Licciardi 140 F.3d at 363. In Licciardi, the Court held that mid-trial disclosure of expert opinion testimony violated the requirements of Fed. R. Civ. P. 26 and required the grant of new trial. In that case, as in the matter before this Court, the surprise testimony "was not on an arguably peripheral matter." Instead, "[i]t went to the heart of the plaintiff's case". Licciardi, 140 F.3d at 366.

Prior cases in which this Court has declined to find an abuse of discretion are factually distinguishable and do not support an argument that the trial court did not abuse its discretion in permitting the challenged testimony in this case. For example, in Littlefield v. Rand, 81 Mass. App. Ct. 1111 (2012)(Rule 1:28 decision), this Court ruled that the trial judge did not err in permitting a defense expert to testify to opinions that had not been disclosed in interrogatory answers, where the specifics of the proposed testimony had been set forth in the parties' joint pretrial memorandum filed with the court eight months before the commencement of trial, thereby eliminating an argument as to

"surprise". Similarly, in Resendes v. Boston Edison Co., 38 Mass. App. Ct. 344, 350 (1995), this Court rejected a challenge to the admissibility of expert testimony where the anticipated opinions had been disclosed approximately one month before trial was to begin, and the defendant did not raise the issue of late disclosure until a lobby conference immediately preceding empanelment of the jury. *See also* Giannaros v. M.S. Walker, Inc., 16 Mass. App. Ct. 902 (1983) (trial judge did not abuse his discretion by allowing expert identified ten days before trial to testify, where the defendant did not seek a continuance of the trial and where a challenge to testimony was not raised until expert had been sworn and questioned about his credentials). In contrast, in this case, plaintiff's counsel did not make *any* effort to supplement plaintiff's prior expert disclosures before trial. Indeed, the first notice to Dr. Liang's counsel of Dr. McMeeking's new theory was when his testimony was elicited during trial.

In decisions addressing the admission of undisclosed or belatedly disclosed expert opinion testimony, federal appellate courts have ruled that the admission of such testimony constituted an abuse

of discretion resulting in prejudice to the opposing party. *E.g.*, Licciardi, 140 F.3d at 363-364; Fortino v. Quasar Co., 950 F.2d 389, 396-97 (7th Cir. 1991)(trial court's admission of testimony was erroneous and prejudicial where plaintiff violated Rule 26 by failing to supplement answers to interrogatories with the new testimony, and testimony was "critical" to the case and completely unexpected from defendant's point of view); Voegeli v. Lewis, 568 F.2d 89, 96-97 (8th Cir. 1977)(trial court's admission of expert testimony was erroneous and prejudicial where expert had changed opinion since deposition and defendant did not alert plaintiff to this change).[2]

Timely disclosure of and supplementation of expert opinions is particularly important in medical malpractice cases. As in this case, expert testimony is typically the focus of a medical malpractice trial because the issues of whether or not the defendant physician deviated from the applicable standard of

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[2] Indeed, even when a party does make a pretrial supplementation of an expert witness, federal courts recognize that a party should not use the possibility of supplementation to "sandbag" an opposing party with late disclosures and therefore rejected supplemental reports that alter an expert's theories. Linder v. Meadow Gold Dairies, 249 F.R.D. 625, 639 (D. Hawaii 2008) *citing* Beller ex rel. Beller v. United States, 221 F.R.D. 689, 695 (D. N.M. 2003).

care and whether or not the defendant's alleged deviation caused a plaintiff's injury must be established by expert testimony. *See* Harlow v. Chin, 405 Mass. 697, 701 (1989); Forlano v. Hughes, 393 Mass. 502, 507 (1984); Haggerty v. McCarthy, 344 Mass. 136, 139 (1962) For that reason, courts in other jurisdictions are particularly reluctant to permit parties to offer previously undisclosed expert testimony during medical malpractice trials. *See, e.g.*, Cleveland v. Hamil, 119 So. 3d 1020, 1024 (Miss. 2013 (new trial ordered where trial court erred in permitting expert in medical malpractice action to testify to undisclosed opinions); Turner v. Delaware Surgical Group, P.A., 67 A.3d 426, 430-432 (Del. 2013)(new trial ordered where trial court abused its discretion by allowing plaintiff's expert in medical malpractice action to testify to opinions that had not been previously disclosed; admission of testimony constituted significant prejudice); Papke v. Harbert, 738 N.W.2d 510, 528-530 (S.D. 2007)(new trial ordered where admission of previously undisclosed expert testimony in medical malpractice action was error and denied plaintiff a fair trial).

As explained in detail above, Dr. McMeeking's opinion that the standard of care required Dr. Liang to spend twenty (20) minutes with Mr. Kace was not set forth in the Plaintiff's disclosure, and there was no supplementation prior to trial or at any time before Dr. McMeeking presented his new theory to the jury. Instead, the disclosure of Dr. McMeeking's anticipated testimony specifically identified three distinct areas in which Dr. Liang allegedly deviated from the accepted standard of care, but did not include any reference to, or criticism of, the amount of time that Dr. Liang spent with the patient. Plaintiff's counsel elicited the challenged testimony from Dr. McMeeking without any notice to defense counsel that he intended to do so, and proceeded to focus the jury's attention on the precise issue that had not been included in the disclosures.

The record is clear that the Defendant was prepared to counter the expected opinion testimony of Dr. McMeeking, as it had been disclosed by the Plaintiff, through the testimony of Dr. Benanti. The Defendant did not anticipate, and could not have anticipated, that the Plaintiff would introduce a wholly new theory of liability in the middle of trial.

Here, as in Licciardi, the Defendant was prejudiced by preparing to try the case by addressing the specific theories of liability set forth in detail in the disclosure of Dr. McMeeking's anticipated testimony, only to have the Plaintiff put on a case "addressed to a different predicate key issue." 140 F.3d at 364. Cf. Thibeault v. Square D. Co., 960 F.2d 239, 244 (1st Cir. 1992)(noting that expert disclosure rules are intended to facilitate a "fair contest with the basic issue and facts disclosed to the fullest practical extent.")

Plaintiff's counsel did not provide any explanation or justification for the failure to disclose the challenged testimony. Moreover, there is no merit to any suggestion by the Plaintiff that the testimony was proper because Dr. Liang had testified that it would not be appropriate to spend less than five minutes with a patient such as Mr. Kace. Dr. Liang was not designated as an expert witness, and his testimony in this regard did not constitute expert opinion testimony. Furthermore, the length of time that Dr. Liang spent with Mr. Kace was a disputed issue. Most importantly, however, there is no reasonable basis for the Plaintiff to cite this

testimony as justification for the introduction of undisclosed opinion testimony from Dr. McMeeking that the standard of care required Dr. Liang to spend twenty minutes with Mr. Kace.

Furthermore, the prejudice to the Defendant that resulted from the introduction of a new theory of liability in the middle of trial was in no way ameliorated by the fact that the Defendant elicited testimony from his expert, Dr. John Benanti, that Dr. Liang complied with the standard of care in his evaluation of the patient, including the amount of time that he spent taking a history and conducting a physical examination. Dr. Benanti also testified that the amount of time that Dr. Liang spent with the patient "had no bearing on the assessment." (Tr. 522-524, 560) It does not follow, however, that the Defendant's ability to elicit this testimony eliminated the prejudice caused by the lack of disclosure, because the mid-trial addition of this new theory deprived defense counsel of any meaningful opportunity to research or examine the validity of Dr. McMeeking's undisclosed opinions. For example, prior disclosure would have permitted defense counsel and the defense expert to engage in medical literature

research on the issue of the appropriate duration of an examination of someone presenting with Mr. Kace's symptoms, as well as to conduct discovery concerning the foundation, or lack thereof for Dr. McMeeking's opinion that the standard of care required a minimum of twenty minutes regardless of the information elicited during a shorter examination. Such research and discovery would not only have assisted in presenting countervailing opinions but also would have enabled Dr. Liang's counsel to cross-examine Dr. McMeeking on the issue.[3] As explained by the First Circuit Court of Appeals, it is "beyond dispute that an eleventh-hour change in a party's theory of the case can be [as harmful as the introduction of new expert testimony on the eve of trial], perhaps more harmful, from the standpoint of his adversary." Thibeault, 960 F.2d at 247 (citations omitted).

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[3] Had defense counsel been aware of the undisclosed opinion, he would have been on notice that further development of the factual record with respect to the disputed issues concerning how much time Dr. Liang spent with Mr. Kace. Absent notice that Dr. McMeeking would opine on the length and adequacy of the examination, there was no reason to do so since it appeared that the issue at trial would be whether or not the diagnosis of bronchitis, based on Mr. Kace's signs and symptoms and the results of his chest x-ray, was within the standard of care and whether or not an EKG and cardiac enzyme testing was required.

C. The Trial Court Erred In Permitting Plaintiff's Counsel To Cross-examine the Defendant By Reference to Printed Website Pages Which Were Not Authenticated and Constituted Hearsay Not Subject to Any Exception.

As explained above, Plaintiff's counsel was permitted to cross-examine Dr. Liang, over objection, about the contents of documents that purportedly were printed from the websites maintained by Mayo Clinic and Johns Hopkins University Hospital, and which purported to describe the common symptoms of myocarditis. Dr. Liang was not familiar with those websites, which are directed to a lay person. (Ex. 79-82) The Plaintiff did not make any attempt to establish that the websites contained authoritative information through any other witness or means. In short, the contents of the documents were not authenticated and constituted rank hearsay not subject to any exception to hearsay rule. *Cf.* Brusard v. O'Toole, 429 Mass. 597, 608 (1999) (hospital's written policies and procedures constituted hearsay not subject to any exception).

The Plaintiff had not identified the documents as "learned treatises" under the provisions of Chapter 233, §79B, and did not contend that they fell within

that statutory exception to the hearsay rule. Furthermore, Plaintiff's use of these documents in cross-examining the Defendant, who was not testifying as an expert, plainly was not permissible under Commonwealth v. Sneed, 413 Mass. 387, 396 (1992). In Sneed, the Supreme Judicial Court adopted Proposed Mass. R. Evid. 803(18), which provides: "To the extent called to the attention of **an expert witness** upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, **established as a reliable authority** by the testimony or admission of the witness or by other expert testimony or by judicial notice ... may be read." (Emphasis supplied.)

The documents at issue were undated, and therefore the Plaintiff cannot contend that the information on the websites at some unknown point of time was relevant to the standard of care as it applied to Dr. Liang in August of 2006. Nonetheless, plaintiff's counsel not only read from the printouts during Dr. Liang's examination, but also referred to the alleged Johns Hopkins and Mayo Clinic "studies" in his closing argument (Tr. 642), apparently seeking to

validate the inadmissible evidence by invoking the names of two well known hospitals. In the absence of any basis for Plaintiff's counsel to read from documents that were neither authenticated, admissible, nor relevant to the matters before the jury, it was clear error for the trial court to overrule the Defendant's objection.

D. The Trial Court Unfairly Precluded Defense Counsel From Referencing the Contents of a Medical Record That Was In Evidence During His Cross-examination of Plaintiff's Expert Witness

Plaintiff's counsel questioned Plaintiff's expert witness, Dr. McMeeking, about the significance of information pertaining to Mr. Kace's medical history of bronchitis, including the symptoms that he presented with at visits with other medical health care providers. More specifically, Dr. McMeeking was asked to review and comment upon the information contained in Mr. Kace's medical records from Pediatric & Adolescent Medicine, pertaining to treatment for bronchitis in September of 2000 (Tr. 243-244; Ex. 20), and from Ohio University Health Services, pertaining to treatment for bronchitis on October 14 and 16, 2003, and on May 26, 2004. (Tr. 242-243; Ex. 23, 24) In response to questioning by Plaintiff's counsel, Dr.

McMeeking testified that the Ohio University Health Services records did not reflect any complaints of chest pain. (Tr. 243) Dr. McMeeking's testimony thus conveyed to the jury that the absence of chest pain on prior occasions that Mr. Kace had bronchitis was medically significant, and formed a basis for his opinion testimony in this case. Plaintiff's counsel did not ask Dr. McMeeking whether Mr. Kace complained of chest pain at the time he sought treatment for bronchitis at Pediatric & Adolescent Medicine. When Defendant's counsel sought to question Dr. McMeeking as to whether the Pediatric & Adolescent Medicine record reflected a complaint of chest pain, he was precluded from examining Dr. McMeeking on the contents of this record, which had been placed in evidence by the Plaintiff. (Tr. 325-327)

To the extent that Plaintiff's counsel raised an issue as to the significance of Mr. Kace's prior history of bronchitis <u>with</u> chest pain, the Defendant should have been permitted to fully explore the basis of Dr. McMeeking's opinions, including whether he placed any significance on the contents of the other medical records, particularly if they showed a presentation of bronchitis <u>without</u> chest pain.

Plaintiff's counsel's objection to defense counsel's questioning suggested that the writing on the record was unclear. (Tr. 324) This argument is misplaced, because it was for Dr. McMeeking to say whether he understood the contents of the record at issue. Moreover, Judge Fahey precluded the Defendant from questioning Dr. McMeeking about this record based upon a perception that defense counsel was impermissibly seeking to use the contents of the record to establish the standard of care as it existed in 2006. (Tr. 326) When defense counsel sought to further argue the basis for questioning Dr. McMeeking about this record ("Can I be heard just briefly, your Honor?"), Judge Fahey refused to allow such argument: "No, I've heard you on the standard of care issue." (Tr. 326) Accordingly, the Defendant was unfairly limited in his cross-examination of Dr. McMeeking.

E. A New Trial Is Required Because The Trial Court's Erroneous Evidentiary Rulings Adversely Affected The Defendant's Substantial Rights.

A new trial is warranted when an error in the admission of evidence injuriously affects the substantial rights of a party. See G.L. c. 231, §§ 119, 132. The substantial rights of a party are

adversely affected when, "viewing the record in a commonsense way," the evidentiary errors "could have made a material difference" in the outcome." Fyffe v. Massachusetts Bay Transit Auth., 458 Mass.App.Ct. 457 (2014)(new trial required where counsel repeatedly injected facts not in evidence, including references to plaintiff's risk of future injury and the defendant's alleged indifference to passenger safety because those remarks "could have influenced the jury's decision-making process, and thus deprived the defendants of a fair trial."), *citing* DeJesus v. Yogel, 404 Mass. 44, 48 (1989) *See also* Irwin v. Ware, 392 Mass. 745, 748 (1984)(erroneous admission of letter containing hearsay as to blood alcohol level of driver whom police were alleged to have negligently failed to remove from road impaired Town's substantive rights and therefore required a new trial); Grant v. Lewis/Boyle, Inc., 408 Mass. 269, 275 (1990) (because improperly admitted hearsay contained in medical reports directly contradicted a central contention of the defendant's case, the jury "might have reached a different result if the evidence had been excluded" and, therefore, its admission injuriously affected the substantial rights of the defendant.) Here too, the

trial court's erroneous evidentiary rulings constituted an abuse of discretion that resulted in unfair surprise and prejudice to Dr. Liang and therefore impaired his substantive rights. There can be no doubt that Dr. McMeeking's surprise opinion and the purported Johns Hopkins and Mayo Clinic printouts could have influenced the jury's decision-making process, and thus deprived Dr. Liang of a fair trial. *See* DeJesus, 404 Mass. 49. Accordingly, a new trial is required. Most significantly, Plaintiff's counsel was permitted, over objections by defense counsel based upon a lack of disclosure, to elicit testimony from Dr. McMeeking pertaining to a new theory of liability that the Defendant could not have anticipated from the information provided in Plaintiff's disclosures. "The expert disclosure requirements are not merely aspirational, and courts must deal decisively with a party's failure to adhere to them." Lohnes v. Level 3 Communications, Inc., 272 F.3d 49, 60 (1st Cir. 2001).

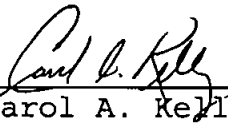
The surprise testimony that the Plaintiff was allowed to introduce through Dr. McMeeking was not on a peripheral matter, but instead became a focus of the Plaintiff's case, as illustrated by Plaintiff's

closing argument to the jury. *See*, Fyffe, *supra* (new trial ordered where counsel's improper remarks permeated the opening and closing statements). In his closing argument, Plaintiff's counsel placed significant emphasis on the length of the time that Dr. Liang allegedly spent with Mr. Kace, rather than the propriety of the care and treatment that Dr. Liang provided to Mr. Kace as discussed in the disclosure of Dr. McMeeking's anticipated testimony. That harm was compounded when plaintiff's counsel suggested that the jurors consider their own experiences in emergency rooms regardless of the circumstances of any such emergency room visits. A trial court "must take care to avoid exposing the jury unnecessarily to inflammatory material that might enflame the jurors' emotions." Commonwealth v. Berry, 420 Mass. 95, 209 (1995) Here, the admission of Dr. McMeeking's undisclosed opinion testimony created a substantial likelihood that the jury would focus on the Plaintiff's emotionally charged argument that Dr. Liang rushed to judgment and did not spend enough time with Mr. Kace. The admission of this testimony constituted an abuse of discretion resulting in prejudice to the Defendant and requires a new trial.

CONCLUSION

For the reasons set forth above, Dr. Liang respectfully requests that the judgment entered below be vacated, and that this action be remanded for a new trial.

Respectfully Submitted,
The Defendant, Ivan Liang, M.D.
By his Attorneys



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Certification of Counsel
Pursuant to Mass.R.A.P. 16(k)

In accordance with Rule 16(k) of the Massachusetts Rules of Appellate Procedure, I, Carol A. Kelly, counsel for Ivan Liang, M.D., hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16(a)(6)(pertinent findings or memorandum of decision); Mass. R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass. R.A.P. 16(h)(length of briefs); Mass. R.A.P. 18 (appendix to the briefs); and Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

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Dated: October 17, 2014

ADDENDUM

03.31

4/24

NOTICE

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2008-04717 -B

NOTICE SENT
04.25.14
L.A.M.
A.C.M.JR.
R.M.H.
R THOMAS
W.D.R.JR.
W.D.R.III

LYNN KACE, AS ADMINISTRATOR OF THE ESTATE OF JEFFREY KACE,

Plaintiff

V.

IVAN LIANG, M.D.,

Defendant

(MT)

MOTION OF THE DEFENDANT, IVAN LIANG, M.D., FOR A NEW TRIAL, OR IN THE ALTERNATIVE, ENTRY OF A REMITTITUR

Now comes the Defendant, Ivan Liang, M.D., pursuant to Rule 59 of the Massachusetts Rules of Civil Procedure, and hereby moves that this Honorable Court set aside the judgment entered on March 5, 2014, and to set this case down for a new trial. In the alternative, the Defendant requests a remittitur of the jury's excessive award. As grounds therefore the Defendant states as follows:

Background and Introduction

This matter was tried beginning on February 25, 2014. The evidence established that the Plaintiff's decedent, Jeffrey Kace, presented to the St. Elizabeth's Medical Center Emergency Department on August 14, 2006, with symptoms which included chest pain. The Defendant, Dr. Liang, evaluated Mr. Kace and discharged him with a diagnosis of bronchitis.

PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES
TITLE II ACTIONS AND PROCEEDINGS THEREIN
CHAPTER 233 WITNESSES AND EVIDENCE
Section 79B Fact statements published for persons in particular occupation

Section 79B. Statements of facts of general interest to persons engaged in an occupation contained in a list, register, periodical, book or other compilation, issued to the public, shall, in the discretion of the court, if the court finds that the compilation is published for the use of persons engaged in that occupation and commonly is used and relied upon by them, be admissible in civil cases as evidence of the truth of any fact so stated.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

TITLE V. DISCLOSURES AND DISCOVERY

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) REQUIRED DISCLOSURES.

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set

by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(3) *Pretrial Disclosures.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) DISCOVERY SCOPE AND LIMITS.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) *Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.*

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) PROTECTIVE ORDERS.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

(d) TIMING AND SEQUENCE OF DISCOVERY.

(1) *Timing.* A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) *Sequence.* Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) SUPPLEMENTING DISCLOSURES AND RESPONSES.

(1) *In General.* A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) *Expert Witness.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.

(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a

statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) *Expedited Schedule.* If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) SIGNING DISCLOSURES AND DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS.

(1) *Signature Required; Effect of Signature.* Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for Improper Certification.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 28, 2010, eff. Dec. 1, 2010.)

Rule 27. Depositions to Perpetuate Testimony

(a) BEFORE AN ACTION IS FILED.

(1) *Petition.* A person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides. The petition must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony. The petition must be titled in the petitioner's name and must show:

(A) that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought;

(B) the subject matter of the expected action and the petitioner's interest;

(C) the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

(D) the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and

(E) the name, address, and expected substance of the testimony of each deponent.

(2) *Notice and Service.* At least 21 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. If any expected adverse party is a minor or is incompetent, Rule 17(c) applies.

(3) *Order and Examination.* If satisfied that perpetuating the testimony may prevent a failure or delay of justice, the court must issue an order that designates or describes the persons